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O'CALLAHAN AND ITS PROGENY: A SURVEY OF THEIR IMPACT ON THE JURISDICTION OF COURTS-MARTIAL

I. INTRODUCTION

On the evening of July 20, 1956, Sergeant James E. O'Callahan, a member of the United States Army stationed at Fort Shafter, Oahu, Territory of Hawaii was apprehended by a private security officer for breaking into the hotel room of a young girl, assaulting and attempting to rape her. At the time of this incident, Sergeant O'Callahan was on an evening pass, and was attired in civilian clothes. He was subsequently delivered to military authorities; tried by a general court martial for attempted rape, housebreaking, and assault with intent to rape in violation of Articles 80, 130 and 134 of the Uniform Code of Military Justice; convicted on all counts; and sentenced to ten years imprisonment at hard labor, forfeiture of all pay and allowances, and a dishonorable discharge. After granting a writ of certiorari, the Supreme Court, in a 5–3 decision, reversed O'Callahan's conviction holding:

In the present case petitioner was on leave when he committed the crimes with which he is charged. There was no connection — not

1. Art. 80 Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. § 880 (1964), provides:

   Attempts.
   
   (a) An act, done with specific intent to commit an offense under this code, amounting to more than mere preparation and tending but failing to effect its commission, is an attempt to commit that offense.
   
   (b) Any person subject to this code who attempts to commit any offense punishable by this code shall be punished as a court-martial may direct, unless otherwise specifically prescribed.
   
   (c) Any person subject to this code may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

2. O'Callahan v. Parker, 393 U.S. 822 (1968). The defendant had collaterally attacked this conviction by a coram nobis petition in the United States Court of Military Appeals. This court accepted the petition but denied relief on the merits.

The purpose of this Comment is twofold: to provide a critical analysis of the O'Callahan decision, itself, and to explore its subsequent impact on the jurisdiction of military courts-martial.

II. BACKGROUND — THE CONSTITUTION, MILITARY COURTS, AND PREVIOUS LIMITATIONS ON JURISDICTION

A. Courts-Martial — Constitutional Authorization, Limitation of the Rights of Person Subject Thereto

It has been recognized that the demands placed upon the military establishment also dictate that its members be subject to a mode of justice variant from that available in common law courts.\(^4\) The requirements of discipline and efficiency under unusual or exigent conditions demand that the trial and punishment of military offenders be swift, unimpeded by certain of the safeguards otherwise guaranteed civilians.\(^5\) Frequently, due to the isolated regions in which a military organization is forced to operate, a system of civil courts is unavailable for the trial of military offenders, and even where such courts are available, the requirement of mobility dictates that military defendants, witnesses, and complainants, be immune from confinement to a single location during the course of litigation. The military must, therefore, carry with it its own judicial system.\(^6\)

Recognizing such demands, the framers of the Constitution and the Bill of Rights enunciated a distinction between the rights and procedural safeguards granted ordinary citizens and those extended to persons sub-


4. See 1 W. Blackstone, Commentaries 413 (T. Cooley ed. 1884); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123 (1866).

5. Id.

ject to military jurisdiction. Article I, section 8, clause 14 provides: "The Congress shall have Power ... to make Rules for the Government and Regulation of the land and naval forces." This provision has been construed to authorize the trial by court-martial of persons falling within the authority granted Congress. It also indicates that such trials are convened pursuant to the article I legislative power rather than under the "cases and controversies" categorizations of the article III judicial power. Therefore, such trials are not subject to the stipulation that "The trial of all crimes, ... shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed. . . ." 10

The fifth amendment provides: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . ." 11 This provision makes it clear that there need be no indictment for such offenses as Congress can authorize military tribunals to try under its article I power. 12

Such a limitation has been held by implication to apply equally to the sixth amendment right to a trial by an impartial jury. To extend this right to cases cognizable by military tribunals, would abridge the authority of Congress to govern the military by courts-martial. 13

B. Limitations on Jurisdiction of Courts-Martial

The rights, deemed unavailable to persons subject to trial by military courts, have traditionally held so prominent a place in American const-

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8. See, e.g., Reid v. Covert, 354 U.S. 1, 19 (1957).
10. U.S. Const. art. III, § 2, cl. 3. See Ex parte Quirin, 317 U.S. 1, 40 (1942). It should also be noted that inasmuch as article III does not extend to trials by military tribunals, the military offender is not afforded the safeguards guaranteed by section 1, e.g., the right to a trial before a judge installed "during good behavior," and receiving a salary "which shall not be diminished during... Continuance in Office."
13. U.S. Const. amend. VI, provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."
14. See Ex parte Milligan, 71 U.S. (4 Wall.) 2, 122-23 (1866); United States ex rel. Toth v. Quarles, 350 U.S. 11, 36 (1955) (Reed, J. dissenting). For an article espousing the position that the Bill of Rights, with the fifth amendment exception, was intended to apply to military personnel, see Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 Harv. L. Rev. 293 (1957). But see Wiener, Courts-Martial and the Bill of Rights: The Original Practice, 72 Harv. L. Rev. 1, 266 (1958). See also Antieau, Courts-Martial and the Constitution, 33 Marq. L. Rev. 25 (1949).
tutional experience that courts have always been circumspect to insure that the jurisdictions of courts-martial not be extended beyond that necessary to insure the maintenance of order, morale, and discipline within the armed forces.15

In Ex Parte Milligan,16 a landmark in Supreme Court history, the Court held unconstitutional the conviction of an Indiana resident by a military commission:

[Military jurisdiction granted by unwritten laws and usages of war] can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.17

The Court reached a similar conclusion in United States ex rel. Toth v. Quarles18 where an honorably discharged Air Force veteran was convicted by a general court-martial for committing a murder while serving in Korea. The Court ruled unconstitutional Article 3(A) of the Uniform Code of Military Justice19 insofar as it authorized discharged military personnel to be tried by court-martial for the commission of certain crimes committed while in active service. In so doing it held:

For given its natural meaning, the power granted Congress “To make Rules” to regulate “the land and Naval Forces” would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces.20

The Court further reasoned that to permit the construction of this clause in any other manner would necessarily constitute an encroachment on the jurisdiction of article III courts where persons on trial are surrounded by the full panoply of constitutional safeguards.21

Relying on the reasoning enunciated in Milligan and Toth the Court in Reid v. Covert22 ruled unconstitutional Article 2(11) of the Uniform

15. Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to “the least possible power adequate to the end proposed.”


17. Id. at 12. Cf. Duncan v. Kahanamoku, 327 U.S. 304 (1946), where the Supreme Court held that the trial of civilians by military tribunals in Hawaii could not be sustained under an executive proclamation of martial law.


19. Art. 3 UCMJ, 10 U.S.C. § 803 (1964), provides:
   (a) Subject to section 843 (article 43), no person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.

20. 350 U.S. at 15 (emphasis added).

21. Id.

Code of Military Justice insofar as it permitted the trial by court-martial of a civilian dependent accompanying military personnel overseas. In so doing, it reversed the murder convictions of two service wives who had been tried by general courts-martial. Echoing the language of *Toth* the court held:

But if the language of clause 14 is given its natural meaning, the power granted does not extend to civilians — even though they may be dependents living with servicemen on a military base. *The term "land and naval forces" refers to persons who are members of the armed services....*

The assurance that service dependents could not be subject to trial by court-martial was subsequently extended to include non-capital crimes. In *Kinsella v. Singleton*, the Court concluded that “[M]ilitary jurisdiction has always been based on the ‘status’ of the accused rather than on the nature of the offense.” In a companion case, *McElroy v. Guagliardo*, the reasoning of these decisions was applied to civilian employees accompanying military forces overseas during times of peace. It was deemed equally impermissible to try such persons by court-martial under the aegis of Article 2(11).

### Footnotes

23. Article 2 UCMJ, 10 U.S.C. § 802 (1964), provides in pertinent part:
   
   The following persons are subject to this chapter:
   
   (11) Subject to any treaty or agreement to which the United States is or may be a party or any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: the Canal Zone, Puerto Rico, Guam, and the Virgin Islands.


25. 354 U.S. at 19 (emphasis added). The court was aided in this construction by reference to the correlative provision in the fifth amendment which it intimated excluded only those persons actually in military service from the rights guaranteed therein. 354 U.S. at 22.


27. *Id.* at 243 (emphasis added).


29. It should be noted, however, that Article 2(10) UCMJ, 10 U.S.C. § 802 (1964), permits the trial by courts-martial of persons serving with or accompanying an armed force in the field in time of war. The Supreme Court has intimated that an exercise of such power would be upheld.

In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront. From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules. *Reid v. Covert*, 354 U.S. 1, 33 (1957). The Court continued:

We believe that Article 2(10) sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of “in the field.” *Id.* at 34 n.61.

The concept “in the field” implies “military operations with a view to an enemy.” 14 Ops. Att’y Gen. 22 (1872). It has been said that the question of whether an armed force is in the field is not to be determined by the locality in which it may be found, but by the activity in which it is engaged at a particular time. See, e.g., *Hines v. Mikell*, 259 F. 28, 34 (4th Cir. 1919), where it was held that forces assembled in temporary cantonments for training in preparation for service in a theater of war were “in the field.”

One may be considered “accompanying” an armed force although he is not directly employed by it, but works for a contractor engaged in a military project...
These holdings combine to establish the proposition that no civilian, be he a service dependant, a discharged veteran, or a non-uniformed employee, may be subject to a trial by court-martial when not actually accompanying a military force against an armed enemy. The significance of the O'Callahan decision can be fully appreciated only when viewed from the perspective of this doctrine and the reasoning contained in the holdings which established it.

III. An Analysis of the Decisional Basis of O'Callahan

A survey of O'Callahan's precursors indicates that the individual's status was the sole consideration in determining amenability to trial by court-martial. However, the O'Callahan court concluded that though "status is necessary for jurisdiction," where the crime is "cognizable in a civilian court" another element is essential — the crime must be "service connected," i.e., some special relationship must exist between the alleged crime and the accused’s military status or the military society of which he is a member. When construed in the factual context of the principal case it seems clear that this requisite would preclude the assertion of court-martial jurisdiction over most crimes committed by servicemen against civilians or perpetrated within the civilian community. Unlike its precursors, O'Callahan did not rely on the language contained in article I, section 8, clause 14 in imposing this limitation. Indeed, it could not, as neither this language nor the precedents which have construed it, indicate such a requirement. Rather, the Court implied such a limitation by relying upon English and American constitutional history and by counterpoising the clause 14 authority against the provisions of the Bill of Rights guaranteeing indictment and trial by jury in cases not "arising in the land or naval forces." The Court noted that the first of the British mutiny acts which falls within the term "in the field," Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945), cert. denied, 328 U.S. 822 (1946). But see Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969), noted in 55 A.B.A.J. 1097 (1969). This case held that recent Supreme Court precedents, e.g., O'Callahan, preclude an expansive view of Article 2(10) ; that this Article could not be utilized to reach a civilian seaman, employed by a private shipping company, who was charged with the commission of premeditated murder while ashore at Da Nang, Republic of Vietnam. In United States v. Averette, No. 22,457 (U.S.C.M.A., Apr. 3, 1970), (cited in 70-4 JUDGE ADVOCATE LEGAL SERVICE, Apr. 23, 1970), the Court of Military Appeals limited the Article 2(10) jurisdiction over civilians to periods of formally declared war, reversing a civilian defendant's court-martial conviction for larceny while employed by an Army contractor in the Republic of Vietnam. But see Weiner, Courts-Martial for Civilians Accompanying the Armed Forces in Vietnam, 54 A.B.A.J. 24 (1968).

Dicta in the O'Callahan decision would tend to indicate that court-martial jurisdiction over civilians can never be condoned, rendering impermissible the application of Article 2(10) to civilians accompanying military forces "in the field" under all circumstances. These cases decide that courts-martial have no jurisdiction to try those who are not members of the Armed Forces no matter how intimate the connection between their offense and the concerns of military discipline.

permitted the court-martial of military personnel for mutiny, sedition, and desertion, and provided that in all other respects such persons were to be subject to ordinary legal process. It intimated that this position was followed by the American practice predating and contemporaneous with the framing of article I. Such a historical survey, however, is far from conclusive. The O'Callahan Court, itself, recognized that the British Parliament's sparing exercise of its authority to create court-martial jurisdiction was the proximate result of flagrant abuses of this power while in the hands of the British sovereigns as it was utilized by them in their quest to gain ascendency over the people and the Parliament.

However, it appears that such abuses of this power were not feared by the framers of article I of the Constitution when the power was placed in the hands of the Legislature. Referring to clause 14 Alexander Hamilton stated:

These powers ought to exist without limitation because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.

Elsewhere he asks:

Are fleets and armies and revenues necessary for this purpose? The government of the Union must be empowered to pass all laws and to make all regulations which have relation to them.

Furthermore, as the dissenting opinion indicates, it appears that prior to and contemporaneous with the Constitutional Convention, the trial by court-martial of military personnel for the commission of crimes having no direct impact on the military service was recognized and sanctioned. A "general article" of war permitting the trial of soldiers for "all crimes not capital" by court-martial was adopted by the Continental Congress in 1775. Contemporary court-martial orders indicate numerous instances

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31. 395 U.S. at 268-69, citing Mutiny Act, 1 W. & M. c. 5 (1689). This act provides in part:
   [n]oe Man may be forejudged of Life or Limb, or subjected to any Kinde of punishment by Martial Law or in any other manner than by the Judgment of his Peers and according to the knowne and Established Laws of his Realme.
32. See 395 U.S. at 270-71.
33. Id. at 268-69. See also dissent of Harlan, J., 395 U.S. at 276-77.
35. Id. at 155.
37. This Article provided:
   All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial according to the nature and degree of the offense, and be punished at their discretion.
Cited in W. Winthrop, Military Law and Precedents 957 (2d ed. 1896, 1920 reprint). This treatise indicates that this article encompassed crimes committed upon or against civilians at or near a military post or camp. Id. at 724.
in which this Article was utilized to try soldiers for the commission of crimes of a non-military nature against the civilian populace. General George Washington, later to become President of the Constitutional Convention, recognized this power as a legitimate instrument for the maintenance of discipline. He wrote in 1779:

All improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other.

Such instances of contemporaneous sanction and usage when considered in light of the unqualified language of article I, section 8, clause 14 permit a conclusion that the framers did not intend to proscribe the practice. Therefore, the limitation placed on the jurisdiction of courts-martial by the O'Callahan Court seems unmerited insofar as it relies on historical American practice and thought.

The O'Callahan Court also reasoned that the express grant of power to the Legislature must be harmonized with guarantees of the Bill of Rights "lest 'cases arising in the land or naval forces' as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers." It is submitted, however, that the precursors of O'Callahan struck such a harmonization by establishing as the test for jurisdiction that suggested by the "natural meaning" of clause 14's language — that amenability to trial by courts-martial is solely a function of one's status and that as to those having the status of military personnel, the congressional power to determine the appropriate subject matter for court-martial

38. See, e.g., 13 WRITINGS OF WASHINGTON 136 (George Washington Bicentennial ed. 1936) (trial of member of Washington's guard for destruction of an inhabitant's home). Other examples of trial by court-martial of soldiers for crimes against civilians include: plundering a civilian's home of "wearing Apparel and Household Furniture," Id. at 137; robbing a house of money, 14 WRITINGS OF WASHINGTON 424 (George Washington Bicentennial ed. 1936); "Breaking into and robbing the house of ... an inhabitant of a number of valuable articles ... ," 15 WRITINGS OF WASHINGTON 100 (George Washington Bicentennial ed. 1936); firing on a civilian inhabitant while absent without leave, Id. at 131; "House-breaking and robbery," Id. at 163; "killing a cow and stealing fowls," 26 WRITINGS OF WASHINGTON 73; "breaking into a house and insulting the inhabitants," Id. at 303. The majority in O'Callahan distinguishes such cases on the grounds that the offenses were committed in wartime and within the theater of operations. 395 U.S. at 270 n.14. However, a reading of these cases fails to elicit any practical distinction between the factual situations reported therein, and those surrounding O'Callahan's offense. Similarly, nothing in these reports tends to indicate that jurisdiction was assumed because the acts were committed during wartime and in a theater of war. It also should be noted that the dissent indicates that court-martial jurisdiction was assumed over similar offenses committed between 1783 and 1795, e.g., "[the court-martial of] Private Kelley for abusing and using violence on Mrs. Cronkyte, a citizen of the United States." 395 U.S. at 278 n.3. It would seem that the "theater of war" distinction could not be utilized to distinguish the latter situations from that encountered in O'Callahan.

40. 395 U.S. at 272-73.
is unqualified. It would also seem that the authors of the Bill of Rights, themselves, contemplated such a harmonization between the congressional power “to make rules for the regulation of the land and naval forces,” and the Bill of Rights guarantees, as the “cases arising” exception to the fifth amendment guaranty, when viewed in its historical perspective, would include crimes of a non-military nature committed by persons in military service.

It is also arguable that the “necessary and proper clause,” when read in conjunction with clause 14, would permit military personnel to be tried by court-martial for offenses committed against civilians as such jurisdiction is a necessary adjunct of the power to maintain order and discipline within the service. In its effort to “harmonize” the power granted Congress in clause 14 and the guarantees of the Bill of Rights, the Court failed to recognize that the military has a legitimate and frequently vital interest in regulating the relationship of its members with the civilian community. Many of the reasons which demand a system of military justice in a purely “military” situation are equally compelling when applied to a military-civilian context. The passage or encampment

41. See Reid v. Covert, 354 U.S. 1, 19 (1957). Coleman v. Tennessee, 97 U.S. 509, 514 (1878). See also Duke & Vogel, supra note 7, at 441. It is arguable, however, that clause 14 was not inserted in the Constitution for the purpose of granting Congress plenary authority to prescribe procedures for punishing members of the armed forces but to make it clear that the powers so included should not devolve upon the executive branch. Id. at 448-49, 455. It is also arguable that the framers would not have intended that Congress possess an unqualified ability to strip the serviceman of many of the constitutional rights guaranteed civilians had they envisioned the contemporary composition of our armed forces. At the time of the enactment of the Constitution the 800 man army consisted exclusively of volunteers and professional soldiers, individuals “who could be said to have chosen [their] world and the law that went with it.” Comment, Servicemen In Civilian Courts, 76 Yale L.J. 380, 396 (1966). Present military requirements, however, demand a military force consisting of over 3 million men, most of whom are non-professionals — conscripted for a short term or serving solely because of indirect compulsion. As a result “the status of [the] soldier merges more and more with that of [the] civilian.” Sutherland, The Constitution, The Civilian and Military Justice, 35 St. John’s L. Rev. 215-16 (1961). The Supreme Court had long recognized a congressional right to authorize the trial by court-martial of service personnel for the commission of crimes of a non-military nature. See Grafton v. United States, 206 U.S. 333, 348 (1907); Smith v. Whitney, 116 U.S. 167, 185 (1886); Coleman v. Tennessee, 97 U.S. 509, 514 (1878).

42. See historical survey p. supra.

43. U.S. Const. art. I, § 8, cl. 18, provides:

The Congress shall have power ... to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

44. In Reid v. Covert, 354 U.S. 1, 20 (1957), the Court took the position that the necessary and proper clause was not available to support jurisdiction over persons not actually “in” the land or naval forces within the meaning of clause 14, reasoning that the necessary and proper clause was available only in aid of jurisdiction within the permissible limits of clause 14. Although the necessary and proper clause may not be utilized to extend military jurisdiction to persons not in the service, it may be helpful in defining those acts which fall within its jurisdiction. See Duke & Vogel, supra note 7, at 440 n.24. Nonetheless, it is arguable that the necessary and proper clause would not lend constitutional support to the exercise of courts-martial jurisdiction over all crimes committed against civilians, e.g., those having no adverse effect on good order and military discipline. Id. at 457-58 (see hypothetical).

of a sizable military unit near a civilian populace is sometimes accompanied by the perpetration of acts of violence against the civilian population. Civilian law enforcement authorities may lack the resources to cope with a sudden rash of such conduct. In such situations unless the military has the capability of swiftly disciplining those responsible for these incidents, not only would the offenders escape punishment, but also crimes against the civilian population would tend to multiply since no effective deterrent would exist. Misconduct of a serviceman within the civilian community also tends to bring discredit upon the service of which he is a member. Where a military installation adjoins a civilian locality the misconduct of a few servicemen frequently fosters an animus between the military and civilian communities. Such a general hostility toward servicemen uniformly deprives all persons assigned to the military installation the services and hospitality which the civilian community would otherwise provide.

Granting civilian law enforcement authorities exclusive jurisdiction over crimes committed within the civilian community can have other deleterious effects which the system of military justice was designed to prevent. The soldier who is unable to meet bail and is incarcerated pending trial or who is convicted and imprisoned by civilian authorities is rendered unavailable for training or duty with his unit. The individual released on bail or on his own recognizance could be required to remain within the jurisdiction of the civilian court depriving the military of flexibility in his utilization. As Mr. Justice Harlan observed in his dissent, analogous procedures under military law would permit participation by the accused serviceman in his units' activities to an extent consonant with the crime he has allegedly committed or of which he has been convicted.
and do not require that the trial be held in the jurisdiction where the offense was committed.\textsuperscript{52} Similarly, the military services provide programs and facilities for rehabilitating the serviceman-defendant and restoring him to duty status.\textsuperscript{53} Confinement in a civilian penal institution would deprive both the military and the serviceman-prisoner of the opportunities provided by these facilities.

Perhaps the Court’s failure to recognize such legitimate interests in the trial and punishment of non-military crimes was the result of its great concern with the possibility of command influence over the participants in a court-martial. It pointed out that at the time of O'Callahan's court-martial, the "convening authority"\textsuperscript{54} held direct command authority not only over the members of the court and the counsel whom he appointed\textsuperscript{55} but also frequently over the "law officer" who presided over the trial.\textsuperscript{56} However, in promulgating such a widely pervasive rule it would seem that greater deference should have been paid the recent changes in court-martial procedure. The Military Justice Act of 1968\textsuperscript{57} enacted several important changes designed to eliminate the possibility of command influence. Of these the Court recognized only one — that under the 1968 Act, the office of the military judge is designed to insure that the presiding officer of a court-martial would not be a subordinate of the convening authority.\textsuperscript{58} The Act also provides however, that in non-capital cases with the concurrence of the military judge, the accused may elect to be tried by the judge sitting alone.\textsuperscript{59} Thus, the defendant who fears the presence of biased court members can insure himself of a trial before an officer beyond the influence of the convening authority. The Act further prohibits a superior officer, in preparing a subordinate's efficiency report, from commenting unfavorably as to that person's conduct as a court member or as to his zeal as a defense counsel.\textsuperscript{60} The threat of such com-


\textsuperscript{53} See AR 190-19, Correctional Training Facilities (1968); Herron, \textit{The United States Disciplinary Barracks System}, 8 Mil. L. Rev. 35 (1960).

\textsuperscript{54} For a delineation of the function of the Convening Authority at the time of O'Callahan's trial, see \textit{Manual for Courts-Martial United States} \S\S 7-9 (1951).

\textsuperscript{55} 395 U.S. at 264.

\textsuperscript{56} Id. at n.3. For an enumeration of the functions of the law officer at the time of O'Callahan's trial, see \textit{Manual for Courts-Martial United States} \S\S 55-56 (1951).

\textsuperscript{57} 10 U.S.C. \S\S 801-73 (Supp. IV, 1968). This Act became effective August 1, 1969.

\textsuperscript{58} 395 U.S. at 264 n.3. The 1968 Act has redesignated the law officer the "military judge." For a discussion of the function of the "military judge" under this Act, see Mounts & Sugarman, \textit{The Military Justice Act of 1968}, 55 A.B.A.J. 470 (1969).

\textsuperscript{59} \textit{Manual for Courts-Martial United States} \S 53d(2) (rev. ed. 1969).

\textsuperscript{60} Art. 37(b) UCMJ, 10 U.S.C. \S 837 (Supp. IV, 1968), provides:

In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active
ment was probably the most significant means for exerting command influence upon court members and defense counsel. It would seem that the addition of these provisions should have had a measurable impact on the Court's decision to promulgate the O'Callahan rule as these and the other modifications incorporated in the 1968 Act are designed to eliminate the same potential abuses which seem to have played a significant part in motivating the Court to rule as it did.

IV. THE IMPACT OF O'CALLAHAN ON THE SCOPE OF JURISDICTION OF MILITARY COURTS

The most undesirable feature of the O'Callahan decision is that it places the jurisdiction of military courts in a state of uncertainty. Constrained in the context of the issues framed by the Court itself, two elements must coalesce in order to divest a military court of jurisdiction: the alleged crime must be "cognizable in a civilian court," and it must be without "service connection." However, it neither indicated the civil courts

do duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court martial.

It has been proposed that an independent corps of "circuit riding" defense counsel, similar to the field judiciary, be established. It would seem that such a system would further eliminate the possibility of command influence over defense counsel. Statement of Dean Kenneth Pye, Hearings on S. Res. 260 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 87th Cong., 2d Sess. 566 (1962).

61. See 395 U.S. at 283-84 (Harlan, J., dissenting). Another serious question left unanswered by the O'Callahan Court is whether the jurisdictional limitations placed upon military courts will be applied retroactively. Immediately after the announcement of this decision, the Judge Advocate General of the Army estimated that in the Army alone, 450,000 courts-martial might be invalid under the O'Callahan standard. These convictions could be challenged not only by some 4,000 servicemen currently confined by the Army, Navy, and Air Force, but also by persons seeking back pay, veterans' benefits, and burial privileges in military cemeteries. The Washington Evening Star, June 6, 1969, at A-3. In Mercer v. Dillon, Misc. Doc. No. 69-57 (U.S.C.M.A., Mar. 6, 1970), cited in 70-2 JUDG4 ADvocAvx LGAL SRvics 2 (Mar.12, 1970), the Court of Military Appeals held that O'Callahan should not be applied retroactively except to cases subject to direct review and, therefore, not final on the date of the O'Callahan decision. The court evaluated O'Callahan in light of the guidelines for granting retroactive application enunciated in Stovall v. Denno, 388 U.S. 293 (1967), i.e., the purpose to be served by the new standard, the extent of reliance by law enforcement authorities on the old standard, and the effect of retroactive application on the administration of justice. It concluded that application of each of these guidelines to O'Callahan would dictate that it be applied prospectively. It also analogized O'Callahan to Duncan v. Louisiana, 391 U.S. 145 (1968), where the Supreme Court held that the fourteenth amendment guarantees defendants a right to a jury trial in state courts. It reasoned that inasmuch as the Court had subsequently ruled that this requirement would have only prospective application, DeStefano v. Woods, 392 U.S. 631 (1968), the requirements set forth in O'Callahan should similarly be so limited. The Supreme Court has indicated that it might rule on the retroactive application of O'Callahan. Redford v. Commandant, United States Disciplinary Barracks, 38 U.S.L.W. 3342 (U.S., Feb. 27, 1969). See note 87 infra. For a thorough treatment of the question of applying O'Callahan retroactively, see Nelson & Westbrook, supra note 29, at 39-46.

62. Does a court-martial, held under the Articles of War ... have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance.... 395 U.S. at 261, citing O'Callahan v. Parker, 393 U.S. 822 (1968).
to which it referred nor delineated any pervasive standards for distinguishing between "service connected" crimes and those that are not.

A. Availability of an Alternative Forum

The Court intimated that the jurisdictional limitation will not apply where no civil forum is reasonably available. Commenting on the circumstances surrounding O'Callahan's crime it stated:

Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.

Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country.63

However, just what judicial presence is sufficient to divest a military court of its jurisdiction over a crime is not clear. O'Callahan's offense, though a violation of the Articles of War, also violated the substantive law of the Territory of Hawaii. Since this law derived its existence from the Federal Government64 it is arguable that a narrow reading of O'Callahan would limit its scope to violations of the Articles of War which are also crimes cognizable in a federal civilian court.65 A majority of the members of the United States Court of Military Appeals,66 however, have rejected such a limited application of the rule. In United States v. Borys,67 it encountered a factual situation similar to that in O'Callahan. The defendant, an Army Captain, was tried by general court-martial and convicted of rape, robbery, and sodomy. The acts had been committed in civilian communities in Georgia and South Carolina where they constituted violations of state law. In reversing the conviction, the majority held that the language of O'Callahan required a broad construction and concluded that the phrase "cognizable in a civilian court" was intended

63. 395 U.S. at 273-74.
64. See Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898), which provided that the Congress of the United States should finally determine appropriate municipal legislation for the Islands; cf. Hawaii v. Mankichi, 190 U.S. 197 (1903).
66. The Court of Military Appeals is composed of three civilians and was established by Congress in 1951. See 10 U.S.C. § 867 (1964). This court was originally conceived of as a "civilian supreme court" for the review of court-martial convictions. . . ." Walker & Niebank, The Court of Military Appeals — Its History, Organization and Operation, 6 Vand. L. Rev. 228 (1953). Genealogically, [The court's] roots lie in the historical development and improvement of military criminal law, a history that is marked by repeated conflicts between military commanders and interested civilians. These conflicts were, however, relatively minor alterations until the twentieth century, when large citizen armies in two World Wars brought millions of Americans, including many lawyers, into intimate contact with the court-martial system.
to include crimes punishable in state as well as federal courts. Inasmuch as the avowed purpose of the rule enunciated in O'Callahan is to guarantee the serviceman charged with a non-military offense, a trial by jury whenever constitutionally required, such an interpretation would seem correct as this safeguard has been guaranteed to violators of state as well as federal criminal laws. The converse of this rationale, however, has been adopted by the Court of Military Appeals to defeat the application of the O'Callahan rule. In United States v. Sharkey, this court was confronted with a conviction for drunkenness and disorder in a public place. It reasoned that since the constitutional guarantee of trial by jury does not extend to petty offenses, and local courts are not obligated to supply these benefits for the trial of such acts, the intent of the O'Callahan rule would not be frustrated by permitting these offenses to be tried by court-martial.

A similar rationale could also be applied to any act committed within the civilian community which does not violate its substantive criminal law but is, nevertheless, violative of military law. Since such an act would not be cognizable as a crime in the civilian court so as to entitle the perpetrator to indictment and trial by jury, it would seem that the offense would be amenable to trial by court-martial without regard to its "service connection."

The Court of Military Appeals has adopted a similar approach in considering the amenability of crimes committed within friendly foreign nations to trial by military tribunals. Although faced with an act which it deemed service-connected — an assault on a fellow serviceman within the Philippine Republic, the court in United States v. Keaton considered the jurisdiction of military courts over non-service connected crimes com-

68. Id. at 549, 40 C.M.R. at 259.
69. See Duncan v. Louisiana, 391 U.S. 415 (1968), where the Supreme Court held that the sixth amendment guaranty of a right to trial by an impartial jury extended to criminal defendants accused of serious state crimes by virtue of the fourteenth amendment. A collateral benefit of divesting military courts of jurisdiction over crimes violative of local law, where the right to trial by jury is guaranteed, is that the offender is insulated from the possibility of double jeopardy. An individual punished by court-martial for the commission of a crime violative of both military and federal law cannot thereafter be tried for the same offense by a federal civilian court. Grafton v. United States, 206 U.S. 333, 352 (1906). However, where the offense is violative of both military and state law, trial by one court does not foreclose the possibility of a subsequent trial by the other. This principle is based on the constitutional doctrine that the federal and state governments derive their existence and jurisdiction from separate sovereigns. See Coleman v. Tennessee, 97 U.S. 509, 513 (1878); Nelson & Westbrook, supra note 29, at 55-56; cf. Abbate v. United States, 359 U.S. 187, 189-96 (1959). In the instances where O'Callahan now forbids cognizance of a state criminal offense by a military court because of its lack of "service connection" this theoretical exposure to double jeopardy is reduced.
71. Id. at 27-28, 41 C.M.R. at 27-28.
72. See United States v. Beeker, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969), where the court held inter alia that since the off-post use of marijuana was not a crime cognizable in a local civilian court, it could be tried as a violation of Article 134 without regard to the non-service connected nature of the offense.
mitted in foreign countries.\textsuperscript{74} The court reasoned that if such offenses were to come within the purview of the \textit{O'Callahan} doctrine, the service-
man who commits them must have available the constitutionally guar-
anteed benefits of an indictment and trial by jury as an alternative to trial by a military court. Inasmuch as the Constitution of the United States applies only to trials by state or federal courts of the United States, such guarantees are not available in Philippine courts. Therefore, the local civilian courts could not be looked to as such an alternative.

Viewing \textit{Keaton} and \textit{O'Callahan} from a theoretical stance, it would appear that in those instances where jurisdiction is waived by the foreign government, the accused could be returned home for trial by a civilian article III court, as it is permissible to try United States citizens for crime committed abroad.\textsuperscript{75} However, since the authority of Congress to designate crimes cognizable by article III courts is limited to matters relating to some power \textit{expressly} granted or to an act specifically enumerated,\textsuperscript{76} there are a large number of codal offenses which could not be cognizable by an article III court and for which the serviceman could not be returned to the United States for trial. Therefore, as to these offenses, the article III courts of the United States cannot provide the alternative necessary to divest military courts of jurisdiction.

However, the court did not limit its holding to such cases. Reading the clause 14 power in conjunction with the “necessary and proper clause,” the court further reasoned that:

When [clause 14 is] read in this manner it seems clear that \textit{foreign trial} by court-martial of \textit{all offenses under the Code committed abroad, including those which could be tried by Article III courts . . .} is a valid exercise of constitutional authority.\textsuperscript{77} It would seem that such reliance upon the “necessary and proper clause” in extending court-martial jurisdiction to \textit{all} crimes committed overseas, regardless of justiciability by an article III court, is contrary to the intent of \textit{O'Callahan}. This decision implicitly rejects the “necessary and proper clause” as a justification for extending court-martial jurisdiction to offenses which are otherwise non-service connected when they are cognizable by a court which is bound by the Bill of Rights.\textsuperscript{78} Nevertheless, subsequent decisions of the Court of Military Appeals have applied the

\begin{footnotesize}
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\item \textsuperscript{74} It should be noted that under pertinent provisions of the \textit{Status of Forces Agreement with the Republic of the Philippines}, the Philippine Government would have the primary right to assert jurisdiction over non-service connected offenses. However, this right could be waived in favor of an American military tribunal, \textit{Agreement with the Republic of the Philippines Concerning Military Bases}, Mar. 14, 1947, art. XIII, 61 Stat. 4019, T.I.A.S. No. 1775, as amended, Aug. 10, 1961, 16 U.S.T. 1090, T.I.A.S. 5851.
\item \textsuperscript{75} U.S. \textit{Const.} art. III, § 2; 18 U.S.C. § 3238 (1964).
\item \textsuperscript{76} See \textit{United States v. Fox}, 95 U.S. (5 Otto) 670, 672 (1877).
\item \textsuperscript{77} \textit{United States v. Keaton}, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969) (second emphasis added).
\item \textsuperscript{78} See 395 \textit{U.S.} at 272–73; 38 \textit{Geo. Wash. L. Rev.} 170, 175 (1969).
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**B. The “Service Connected” Offense**

A more elusive problem is posed by the court’s failure to establish any pervasive definition of the “service connected” offense. It relegates pertinent considerations for distinguishing such offenses to the status of dicta\footnote{In commenting on O’Callahan’s offense the Court observed: The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. . . . The offenses did not involve any question of flouting military authority, the security of a military post, or the integrity of military property. 395 U.S. at 273-74.} and a single footnote.\footnote{Id. at 270 n.14.} The Court made it clear that any crime, regardless of its nature, which is committed within a military reservation will remain punishable by court-martial.\footnote{See note 80 supra.} It implied that the military has a special interest in such crimes as they involve the “security and integrity” of the installation.\footnote{See United States v. Smith, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969). United States v. Allen, 19 U.S.C.M.A. 31, 41 C.M.R. 31 (1969). United States v. Shockley, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969). United States v. Carpo, 18 U.S.C.M.A. 594, 40 C.M.R. 306. For other examples of on-post crimes of a civil nature where jurisdiction has been sustained, see United States v. Paxiano, 18 U.S.C.M.A. 608, 40 C.M.R. 320 (1969) (wrongful appropriation of a civilian owned vehicle); United States v. Williams, 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969) (uttering worthless checks). But see United States v. Riehle, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969), where the Court of Military Appeals rejected the argument that the defendant’s act of bringing a stolen automobile on base so compromised the security of the post that court-martial jurisdiction should vest. The Supreme Court has granted certiorari in a case raising the question of} Relying on this language, the Court of Military Appeals has affirmed the conviction of an airman for carnal knowledge simply because the acts occurred at various locations in on-base housing.\footnote{Id. at 270 n.14.} It has permitted a military court to try a seaman of unpremeditated murder where the offense occurred on a public bus within the confines of a naval station.\footnote{See United States v. Allen, 19 U.S.C.M.A. 31, 41 C.M.R. 31 (1969). United States v. Shockley, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969).} Similarly, it has sustained that part of a multi-offense sodomy conviction where the acts took place within a military camp.\footnote{See United States v. Carpo, 18 U.S.C.M.A. 594, 40 C.M.R. 306. For other examples of on-post crimes of a civil nature where jurisdiction has been sustained, see United States v. Paxiano, 18 U.S.C.M.A. 608, 40 C.M.R. 320 (1969) (wrongful appropriation of a civilian owned vehicle); United States v. Williams, 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969) (uttering worthless checks). But see United States v. Riehle, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969), where the Court of Military Appeals rejected the argument that the defendant’s act of bringing a stolen automobile on base so compromised the security of the post that court-martial jurisdiction should vest. The Supreme Court has granted certiorari in a case raising the question of} This court has even upheld a robbery conviction in spite of the fact that the actual taking occurred within the civilian community because it found that the force and assault elements of the offense occurred within a military reservation.\footnote{Id. at 270 n.14.} In each of these cases the court simply adopted the
language of *O'Callahan*, concluding that such jurisdiction was a necessary incident of the power to maintain security within a military installation.

The Supreme Court further intimated that any offense committed against another serviceman could continue to be construed as peculiarly military in nature. The Court of Military Appeals has accordingly sustained robbery and housebreaking convictions when committed against fellow servicemen although the crimes occurred respectively in a motel and at an off-base residence. It similarly sustained a conviction for breaking into a Marine Officer's off-post quarters in spite of the fact that the defendant apparently lacked knowledge of the resident's military connection, and although it dismissed other counts of the housebreaking conviction which involved civilian residences. This latter result has prompted Judge Ferguson of this court to call into question the *O'Callahan* Court's intent in including offenses against other service personnel in its catalog of crimes traditionally "military in nature." He indicated that since the military interest in a crime as this one is of such a tenuous nature, that this language should be construed to include only crimes against other service personnel which are committed within a military installation. Moreover, it would seem that insofar as military interest is concerned, no essential difference exists between this housebreaking conviction and a court-martial conviction for carnal knowledge of a fellow serviceman's fourteen-year old daughter which the Court of Military Appeals dismissed for lack of service connection. Such an anomaly, however, is the inevitable result of the *O'Callahan* Court's substitution of equivocal historical examples for a comprehensive standard which realistically balances the needs of the military with the interests of the individual offender and the civilian community.

The language of *O'Callahan* suggests that in certain situations crimes committed against civilians or perpetrated within a civilian community can
also be deemed service-connected. The court exemplified such situations during its discussion of O'Callahan's crime and in the course of its historical survey of court-martial jurisdiction. It intimated that requisite nexus could be found in crime involving military position or authority, and in offenses committed against other persons performing duties relating to the military. It further suggested that other relevant considerations might include the perpetrator's rank, his duty status, and his attire.

An enumeration of such diverse factors, once again exemplifies the necessity of deriving a common denominator that will provide local commanders and their staff judge advocates with a reliable gauge for determining whether an offense possesses the requisite service connection. Judge Ferguson, viewing the aggregate of the situations in which O'Callahan might permit the assertion of court-martial jurisdiction, has suggested such a standard. It reflects his reasons for hesitating to permit court-martial cognizance of all crimes committed against fellow-servicemen, regardless of circumstance despite O'Callahan's intimation that jurisdiction within this sphere might remain untouched.

The gravamen of the term "service connected" as formulated by the Supreme Court in O'Callahan is, in my opinion, the actual impact of the offense on military matters. If the offense tends realistically toward some direct deleterious effect on military matters or discipline, then the offense is "service-connected." If, however, the effect on military matters is remote, then military jurisdiction may not constitutionally attach.

This test, it would seem, embodies the common element pervading the examples to which the O'Callahan Court alluded. Crimes committed under the aegis of military authority or connection tend directly to discredit the service of which the offender is a member. The resultant distrust for military personnel would severely hamper both official and unofficial military-civilian relationships. Similarly, an offense against a person performing duties relating to the military directly impedes the accomplishment of the service's assigned objectives and any offense when committed by an officer seriously compromises the offender's leadership effectiveness and his value to the service.

Though Judge Ferguson would seem to apply the standard to any offense committed by a serviceman on American soil but outside the con-

94. See notes 80, 81 supra.
95. See note 81 supra.
96. The fact that Sgt. O'Callahan was on a pass at the time of his crime appears to have been given some significance by the Court as it is included as a pertinent factor in the question which had been certified for certiorari, 395 U.S. at 261, citing O'Callahan v. Parker, 393 U.S. 822 (1968). The Court also noted the fact that O'Callahan was attired in civilian clothes at the time of his apprehension. 395 U.S. at 259.
98. Id. at 45, 41 C.M.R. at 45. For an analysis suggesting several other approaches for determining the "service connection" of a given offense, see Nelson & Westbrook, supra note 29, at 24-34.
fines of a military installation, it appears that all the members of the Court of Military Appeals would adopt this approach in determining the justiciability of offenses committed against civilians or perpetrated within the civilian community. It also appears, however, that each of the three members of this court has a different concept as to what constitutes a sufficient “impact” on the military to permit cognizance by military court. A survey of recent decisions involving such offenses is demonstrative of these observations.

In *United States v. Harris*99 and *United States v. Stafford*,100 two non-commissioned officers were convicted under Article 134 of conspiracy to communicate and transmit defense information.101 The respective trial courts found that the accused had conspired with several officials of the Soviet diplomatic mission to obtain and pass information relating to the national defense. While noting that jurisdiction to try such offenses was within the purview of federal district courts, the Court of Military Appeals unanimously affirmed the defendant’s convictions by courts-martial. It relied on little else than the fact that the offenses directly affected the government and operation of the military establishment as the documents which the defendants conspired to compromise were immediately connected with military operations and their security was entrusted to military authorities. Similar reasoning has been applied to cases involving possession and use of barbiturates or marijuana. In *United States v. Castro*102 and *United States v. Beeker*,103 where the respective defendants were convicted of off-post possession and use of amphetamines and marijuana in violation of Article 134, this court, again, unanimously agreed that jurisdiction was properly assumed. It held that because such use has disastrous effects on the health, morale, and fitness for duty of persons in the armed forces, that requisite service connection can be found. It also agreed that the mere possession of marijuana or barbiturates so prejudices good order and discipline that the military possesses the requisite interest to try any serviceman accused of such conduct regardless of the situs of the act.

Such unanimity however, does not extend to the class of offenses whose only impact is the fact that the acts, themselves, or the circumstances under which they are committed, tend to discredit the armed forces. Offenses such as uttering worthless checks or wrongfully appropriating an automobile, when committed within a civilian community,

103. 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969). The court, however, concluded that unlawful transportation and importation of marijuana, not involving actual possession, is not a crime subject to the jurisdiction of a court-martial, since such conduct is violative of federal law and the commission of the offense lacks any special relation to the military.
are in themselves, considered non-service connected crimes.\textsuperscript{104} However, if the facts and circumstances surrounding such an offense appear to indicate that the offender's military status facilitated its commission, a majority of this court will find that sufficient impact has been exerted upon the armed forces to support assumption of jurisdiction. In \textit{United States v. Peaks},\textsuperscript{105} the defendant, attired in a fatigue uniform and identifying himself as a member of the armed forces assigned to a local unit, persuaded an automobile dealer to permit him to take a test drive in an automobile. The defendant never returned and was subsequently convicted by court-martial for wrongful appropriation. In sustaining the conviction the court reasoned:

It appears that the accused's military standing facilitated his deception of the automobile salesman and permitted him to misappropriate the vehicle. It seems reasonable to assume that when the used-car salesman gave permission for the accused to test drive the car, he attributed some reliability to the accused as a result of the latter's identification by his military fatigues as a member of the armed forces. Such an abuse of a military status is likely to influence the extent of confidence by the public in members of the armed forces. \textit{We believe the impact of such an abuse is direct and substantial enough to provide the requisite service-connection for the armed forces to exercise jurisdiction over this offense.}\textsuperscript{106}

Various other facts and circumstances may permit a similar inference. Servicemen who use their military identification or a military address in connection with cashing stolen\textsuperscript{107} or forged\textsuperscript{108} checks or who achieve this end merely by representing themselves as military personnel\textsuperscript{109} have been deemed to cause sufficient reliance to be placed on their military status to permit the requisite service connection to be found. The "reliance" doctrine has also been invoked when a serviceman attired in the uniform of a Marine Corps Officer incurred excessive hotel bills which he was subsequently unable to pay\textsuperscript{110} even though the facts of the case failed to indicate that any other representations as to this status had been made. It appears, however, that the attitudes of the three members of the Court of Military Appeals vary significantly in the essentiality of facts tending to indicate reliance. The doctrine that discrediting conduct exerts a sufficient impact on the military to vest jurisdiction only when reliance upon military status can be shown, appears to be the product of Judge Dardan's


\textsuperscript{106} Id. at 20-21, 41 C.M.R. at 20-21 (emphasis added).


reasoning. It seems that Chief Judge Quinn would find that discrediting conduct exerts the requisite impact whenever any circumstance surrounding the commission of the act tends to indicate that the perpetrator is a member of the armed forces. This attitude is exemplified in *United States v. Armes* where the defendant had been convicted by a court-martial of larceny of an automobile belonging to a civilian. The majority of the court concluded that even though the defendant was wearing a fatigue uniform at the time of the theft, since the crime involved property belonging to a civilian and was committed within the civilian community, it lacked the requisite service connection. In a dissent, Chief Judge Quinn reasoned that since the defendant was attired in a fatigue uniform when the crime was committed, the conviction should have been sustained simply because an observer of such discrediting conduct could associate the perpetrator with the armed forces. It would seem, however, that assuming the validity of the "impact" test as the standard for determining service-connection, Judge Dardan's approach is the more reasonable because, as a matter of degree, the military has a much more immediate interest in preserving its integrity with regard to persons with whom its members must deal than with the public in general. The acts punishable under this approach also involve abuses of special privileges or courtesies commonly granted members of the armed services because of their status. The military has a similar interest in preserving these benefits so that its members can continue to enjoy them. Moreover, it seems that no significant variance in service discrediting exists between offenses where the perpetrator is contemporaneously identified as a serviceman, and those where his service connection is made known subsequent to the commission of the offense. Inasmuch as the latter is a consequence of literally all offenses committed by servicemen, it is obvious that such identification cannot in se provide a basis for jurisdiction. Judge Ferguson, on the other hand, would not consider an inference that the offender's military status facilitated his criminal act a sufficient basis to permit cognizance by a military court in the absence of other service connecting factors. In a situation where assumption of jurisdiction was predicated on the fact that the writer of a forged check had included his name and rank on the indorsement, Judge Ferguson argued that whether this data actually aided the writer in the commission of the offense was a matter of pure speculation. His principal basis for disagreement, however, seems to be the fact that the militarily harmful consequences of the acts do not stem from their nature as a Codal offense, but from circumstances which are entirely collateral to the offenses charged. In dissenting from the affirmance of a conviction for wrongful appropriation of an automobile he stated:

The fact that the accused was in uniform or made representations as to his military status is simply irrelevant insofar as the wrongful appropriation of this car is concerned. How then can it be said that this is a factor to be considered in determining the question of jurisdiction.\textsuperscript{114}

Under the Ferguson rationale, a crime whose only service connecting impact is the fact that it is discrediting to the service is properly chargeable only under Article 134 since the tendency "to bring discredit to the armed forces" is an element of that offense.\textsuperscript{115} However, since it is impermissible to charge a person with violating Article 134 when his conduct is specifically punishable by another punitive article,\textsuperscript{116} the thief or forger cannot be charged with an Article 134 violation as the means for punishing his discrediting conduct. Such a requirement, it appears, constitutes an unnecessary qualification of Judge Ferguson's own "impact" standard, as \textit{O'Callahan}, itself, implicitly recognizes that the collateral effects evolving from the commission of a non-military crime, may under certain circumstances, permit a military court to assume jurisdiction over the substantive offense.\textsuperscript{117}

The disparate positions taken by these three judges of the Court of Military Appeals on the question of service discrediting conduct illust-

\textsuperscript{114} United States v. Peak, 19 U.S.C.M.A. 19, 21, 41 C.M.R. 19 (1969) (Ferguson, J., dissenting). For an explication of the facts of this case and the rationale of the majority, see text \textit{supra} at note 106.

\textsuperscript{115} 10 U.S.C. § 934 (1964).

\textsuperscript{116} \textit{See MANUAL FOR COURTS-MARTIAL UNITED STATES} § 213(a) (rev. ed. 1969).

\textsuperscript{117} The \textit{O'Callahan} decision recognized that the military has traditionally held a special interest in crimes involving "abuse of military position." Notes 80, 81 \textit{supra}. It also indicated that a crime involving the "flouting of military authority" could be cognizable by a military court. \textit{Id.} It would also seem that the Court's recognition of a traditional military interest in the punishment of any crime committed by an officer, likewise, indicates approval of assuming jurisdiction over such offenses merely because of their collateral effects upon the service. \textit{Id.} Thus, it is arguable that under the "direct impact" test, an officer accused of a non-service-connected crime could be tried by a military court for both the substantive offense, where the act is violative of a particular punitive article, and for conducting himself in a manner unbecoming an officer in violation of Article 133 UCMJ, 10 U.S.C. § 933 (1964), as such conduct substantially compromises his value to the service. Reflecting on the majority's language, however, Mr. Justice Harlan states:

It is to say the least, strange that as a constitutional matter the military is without authority to discipline an enlisted man for an offense that it may punish if committed by an officer.

395 U.S. at 283 n.11 (emphasis Harlan, J.). In United States v. Borys, 18 U.S.C.M.A. 547, 40 C.M.R. 257 (1969), where an Army Captain was convicted by a court-martial of sodomy, rape, and robbery, the Court of Military Appeals reversed the convictions. Judge Ferguson rejected the \textit{O'Callahan} majority's inference and adopted a position similar to that stated in Justice Harlan's dissent:

I do not construe the implication which appears in footnote 14 of the majority opinion as a determination that the status of an officer justifies military trial for an offense not otherwise constitutionally triable by court-martial. In this regard, I believe an officer "is not clothed with any less constitutional . . . rights than is an enlisted person."

\textit{Id.} at 550 n.1, 40 C.M.R. at 560.
trates the problem inherent in the judicial application of even a pervasive standard to diverse and unique factual situations. Confronted with similar sets of factual circumstances, each member of this court has responded with a peculiar opinion as to whether the military has a sufficient interest in the type of conduct questioned or its consequences to permit court-martial jurisdiction to vest. The guidance afforded by such variant applications of the “direct impact” test is, then, not significantly greater than O’Callahan’s own multi-factor approach. It would also seem that the members of the judiciary lack an adequate appreciation of military needs and interests to render accurate appraisals of the “impact” of a given offense on the military and of its interest in the act’s consequences. It is, therefore, submitted that the Congress should, once again, re-evaluate the Uniform Code of Military Justice. It should particularly revise the punitive articles in a manner that will reflect the doctrine enunciated in O’Callahan and refined by Judge Ferguson’s “direct impact” standard and the cases that apply to it. Such a revision should include a re-definition of the various substantive offenses, incorporating as elements thereof, the circumstances in which the military believes the unlawful conduct exerts such a direct and substantial impact upon its well-being as to justify cognizance by a court-martial.

This re-evaluation would provide commanders and their legal advisors with an operating guide of greater clarity than a judge-made test, and although the standards so enunciated would not be binding upon the federal civilian courts, they would provide them with the benefit of the armed forces’ expertise in instances when it is necessary to evaluate the “service connection” of a given act.

119. It is noteworthy that, although the Toth and Reid decisions rendered unconstitutional portions of Articles 2(10) and 2(11) of the UCMJ as enunciated in the 1951 Manual for Courts-Martial, the Military Justice Act of 1968, 10 U.S.C. §§ 801-73 (Supp. IV, 1968), failed to revise these provisions to conform to the holdings of Toth and Reid and they appear in the 1969 Revision of the Manual in their original form.
120. Judicial deference to a Congressional enactment delineating the scope of jurisdiction it believes a federal court can exercise consistently with constitutional principles would be by no means unique. The Constitution confers upon the United States courts “all Cases of admiralty and maritime Jurisdiction.” U.S. Const. art. III, § 2. However, precisely what constituted an “admiralty” or “maritime” case was unclear and it remained for the court in each case before it to determine whether the facts reasonably fell within the compass of the Constitutional provision. United States v. Matson Navigation Co., 201 F.2d 610, 612 (9th Cir. 1953). Congress, therefore, has on several occasions sought to define the scope of such jurisdiction, even to the extent of expanding it to encompass cases which had traditionally been recognized as falling without the maritime jurisdiction. In 1845, Congress abolished the traditional “tidewater” limitation on the maritime jurisdiction of federal courts, defining the jurisdictional grant to encompass certain cases arising upon navigable lakes and the waters connecting them. 5 Stat. 726 (1845), as amended, 28 U.S.C. § 1873 (1964). In The Genesee Chief, 53 U.S. 443 (1851), this definition of the scope of federal maritime jurisdiction was followed by the Supreme Court in spite of the fact that it had previously rejected the inclusion of cases arising on non-tidal waters in the maritime jurisdiction. The Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825). For a detailed discussion of this development, see D. Robertson, Admiralty and Federalism 104-16 (1970).
V. Conclusion

The majority opinion in *O'Callahan* is a monument to result orientation and judicial imprecision. Although predicated on the assumption that the military justice system is an instrument of discipline rather than justice and as a result fails to provide the accused with many of the procedural safeguards insured in civilian courts, the decision fails to make a meaningful and objective comparison of the two systems and the relative merits of each. Though it emphasizes the fact that military courts substitute a panel of possibly intimidated officers for an impartial jury of the accused's peers, it fails to note that several significant rights

land. Admiralty Extension Act, 46 U.S.C. § 740 (1964). The legislative view of the proper expanse of maritime jurisdiction was, again, respected by the courts. In upholding the assumption of maritime jurisdiction under the aegis of this Act the Ninth Circuit observed:

We have abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned as, for example, in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters.


It should be noted that several of the constitutional guarantees which the *O'Callahan* Court seeks to obtain for military defendants do not operate on state courts where most trials will take place. The fifth amendment right to a grand jury indictment binds only federal courts. See, e.g., Eilenbecker v. Plymouth County, 134 U.S. 31, 35 (1890). The due process clause of the fourteenth amendment does not impose this requirement on the state courts. Bute v. Illinois, 333 U.S. 640, 656-57 (1948). These courts are free to initiate criminal proceedings by the filing of an information by the prosecuting attorney. See, e.g., Moore v. Henslee, 276 F.2d 876, 878 (8th Cir. 1960).

A procedure roughly analogous to the federal practice of preliminary examination and grand jury indictment is provided servicemen to be tried by a general court-martial by the Article 32 investigation. 10 U.S.C. § 832 (1964). Although the recommendation of the investigating officer to dismiss the charges, unlike a similar recommendation by a grand jury, does not result in an automatic dismissal, the Article 32 investigation in several respects, grants the accused greater safeguards than a federal grand jury. Murphy, *The Formal Pretrial Investigation*, 12 MIL. L. REV. 1, 10 (1961). A federal grand jury may return an indictment without the accused having any knowledge of its proceedings. The military defendant, on the other hand, has the right to be present during the investigation, to cross-examine witnesses appearing for the prosecution, and to call witnesses of his own. He also has the right to be represented by counsel at no cost. Art. 32(b), 10 U.S.C. § 832 (1964). For a thorough discussion of the Article 32 investigation, see Murphy, *supra*. It, therefore, appears that where *O'Callahan* requires a serviceeman accused of a serious offense to be tried in a state court lacking a grand jury indictment procedure, rather than assuring him of a significant right, this case would deprive him of one.

Similarly, the Article III requirement that judges shall hold office during good behavior does not bind state courts. State court judges may be appointed for varying terms, elected, or a combination of both. H. ABRAHAM, *The Judicial Process* 26-39 (1962). It is submitted that the judge who must seek re-election is under the same type of pressure which the *O'Callahan* Court feared the law officer had been subject to as a subordinate of the convening authority. It, therefore, seems that this decision does not effectively assure servicemen of standing trial before a judge who is insulated from such extra-judicial pressures. It would also appear that, inasmuch as the Military Justice Act of 1968 removes the military judge from the command of the convening authority and alleviates the possibility for such pressure, *O'Callahan*, in some instances, would deprive the military defendant of a safeguard otherwise available to him.

*See* 395 U.S. at 265-66. The *O'Callahan* Court does note, however, that the UCMJ requires court-martial to be composed of at least one-third enlisted members.
guaranteed the accused in military courts have no analogue in many state courts,\textsuperscript{123} where military defendants will now stand trial with greater frequency.\textsuperscript{124} Rather, it speaks of the military justice system to which Judge (now Chief Justice) Berger has referred as "the most enlightened military code in history"\textsuperscript{125} only in terms of disparagement and condescension. The Court's conclusion is ostensibly grounded upon a balancing of the congressional power to "make rules for the government and regulation of the land and naval forces" with the rights guaranteed the criminal defendant by the fifth and sixth amendments. It fails, however, to explore when requested by the accused. \textit{Id.} at 263 n.2. Article 25 UCMJ, 10 U.S.C. § 825 (1964).

It is arguable that in many instances a military court, composed exclusively of officers, would be more objective as a trier of fact than its civilian counterpart, the petit jury. The educational qualifications possessed by military officers are higher than those of a cross section of the typical civilian community; a large percentage possessing college degrees. Thus, such a board could be compared to a blue ribbon jury, a device designed to minimize prejudice. \textit{See} H. ABRAHAM, \textit{supra} note 121, at 109. It would also seem that a petit jury drawn from a civilian locality would be inclined to reflect in its determinations any prejudices which the community as a whole might harbor toward service personnel stationed in the surrounding area.

123. For example, few states require the appointment of counsel where the maximum punishment cannot exceed six months confinement. Nelson & Westbrook, \textit{supra} note 29, at 61. Generally, the military accused must be provided with legally qualified counsel, at no cost to himself, whenever requested. Previously, this right was limited to those to be tried before a general court-martial. The 1968 Military Justice Act, however, has extended this right to those to be tried by special court-martial unless, because of physical conditions or military exigencies, legally qualified counsel cannot be obtained. Art. 27(c) UCMJ, 10 U.S.C. § 827 (Supp. IV, 1968). This exception, however, has been limited to rare circumstances and it is never applicable within the continental United States. \textit{Manual for Courts-Martial United States} ¶ 6(e) (rev. ed. 1969); AR 27-10, \textit{Military Justice} ¶ 2-14 (1968). The accused has also been given the right to refuse trial by summary court-martial, the equivalent of magistrate's court, and to demand a special court-martial in lieu thereof. Art. 20 UCMJ, 10 U.S.C. § 820 (Supp. IV, 1968). Likewise, with the exception of individuals embarked on or attached to a vessel, the accused can demand a special court-martial in lieu of accepting non-judicial punishment under Article 15. Art. 15(a); \textit{Manual for Courts-Martial United States} ¶ 132 (rev. ed. 1969). Therefore, for all practical purposes, the military defendant is guaranteed representation by an attorney whenever he faces the possibility of punishment. \textit{See} Nelson & Westbrook, \textit{supra} note 29, at 61.

124. It appears that the Court of Military Appeals will not permit the military defendant, accused of a crime cognizable in a state court, to consent to trial by court-martial in lieu of trial by the civilian forum. In United States v. Prather, 18 U.S.C.M.A. 560, 40 C.M.R. 272 (1969), the accused was convicted by general court-martial of robbery of a gas station within the civilian community. Through the efforts of his counsel he had obtained a release from the civilian authorities who initially apprehended him by agreeing to stand trial by court-martial. The Court of Military Appeals reversed conviction on the ground that the military court lacked jurisdiction over the offense. Although it failed to specifically comment on the defendant's attempt to "waive his right" to stand trial before a civilian court, it is submitted that the position of the majority in ignoring such an attempt is correct. Where a court lacks jurisdiction over the subject matter of a case, the defect is not cured by the defendant's assenting to personal jurisdiction. "Such a want of jurisdiction cannot be waived by pleading or any other form of consent — not even going to trial." \textit{Goldstone v. Payne}, 94 F.2d 855, 857 (2d Cir. 1938). This axiom seems to have been overlooked by Chief Judge Quinn who, in his dissent, equated "waiver" of the "right" to trial by a civilian court to waiver of other constitutionally-guaranteed procedural rights.

legitimate and important governmental interests in retaining jurisdiction over offenses committed by military personnel within the civilian community. It similarly refuses to come to grips with the unequivocal language of Article I, section 8, clause 14 and the precedents construing it, all of which indicate that as to persons in the armed forces, Congress, and not the Court, has the responsibility for determining amenability to court-martial.

The most serious shortcoming of this decision, however, is its failure to define the current jurisdiction of military courts in a manner that will provide a reliable guide for those who must operate under it. The only hints given the reader as to the meaning of the deceptively simple phrase "service connected" are contained in dicta describing the circumstances surrounding O'Callahan's crime and in equivocal historical examples.

The principal responsibility for defining the scope of this decision has devolved to the United States Court of Military Appeals which has developed several pervasive standards for its application. Construing the holding in light of its ostensible purpose, this court has concluded that military courts may retain jurisdiction over offenses whenever the right of a jury trial is not constitutionally guaranteed. Such a limitation would permit military courts to try minor offenses without regard to service connection, and any violation of military law having no analogue in local civil courts. This analysis has been further extended to permit military courts to assume jurisdiction over any crime committed abroad.

126. The problems of practical application resulting from this imprecise language are analogous to the problems raised by Escobedo v. Illinois, 378 U.S. 478 (1964). After evaluating this decision, Professor Enker and attorney Elson concluded:

[ ]The future may see the Supreme Court withdraw considerably from the broad language of . . . Escobedo. In the meantime, however, the lower courts - federal and state - and the law enforcement officers lack the guidance necessary to enable them to administer the new tests. These undesirable effects . . . stem principally from the Court's failure to articulate its premises clearly. . . . Enker & Elson, Counsel for the Suspect, 49 MINN. L. REV. 47, 91 (1964).

Inasmuch as the O'Callahan decision relates to the jurisdiction of military courts over the subject matter of an offense, it will also provide fertile ground for collateral attacks of future court-martial convictions via writs of habeas corpus in federal district courts. Such attacks could prove extremely disruptive of the military appellate system, if interposed prior to the exhaustion of the defendant's military remedies. See Nelson & Westbrook, supra note 29, at 47. In Noyd v. Bond, 395 U.S. 683 (1969), however, the Supreme Court held that, unless the petitioner can show that prompt and effective relief is unavailable in the Court of Military Appeals, failure to exhaust military remedies prior to seeking habeas corpus in federal civil courts is inexcusable. Id. at 698. In so deciding the Court, per Mr. Justice Harlan, emphasized that Congress purposely vested the power to review military decisions in a specialized court so that disinterested civilian judges could gain an understanding of the distinctive problems of the armed forces. Although in Noyd the petitioner contended that his confinement violated certain technical provisions of the UCMJ, it would seem that this limitation on the use of habeas corpus writs would apply equally to jurisdictional challenges based on O'Callahan. In such situations, no less than those involving specialized questions concerning the UCMJ, a court having expertise in military matters should be able to lend its experience in determining the question of "service connection" prior to review by a civilian court. Not only would application of this procedure prevent disruption of the military appellate system but the resultant determinations by such courts would provide helpful guidelines to federal civil courts. For a thorough discussion of the question, see Nelson & Westbrook, supra note 29, at 46-52.
Relying upon the language of *O'Callahan* and the examples presented therein, this court has also formulated a standard for determining an act's "service connection." It is predicated upon the impact which the court deems the offender's conduct to exert on the service of which he is a member. Although such an approach provides a guide of greater accuracy than do the examples to which the *O'Callahan* decision alluded, it is submitted that optimum guidance would be afforded by a legislative revision of the punitive articles of the Uniform Code of Military Justice in a manner reflecting the guidelines promulgated by this court. Such a revision, it would seem, could not only embody the new jurisdictional limitations placed upon military courts, but also indicate those situations in which the military deems that an offense exerts the requisite impact to justify assertion of jurisdiction.

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